(1) Supreme Court, U.S.
FILED

00-275 AUG 15 2000

OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2000

JOSÉ G. LARA, E. J. LOZANO, ALFREDO JUÁREZ, G. TIM HERVEY, EARL L. HARBECK, VOLAR CENTER FOR INDEPENDENT LIVING, LUIS ENRIQUE CHEW, DESERT ADAPT, MYRA MURILLO, AND MARGARITA LIGHTBOURNE-HARBECK,

Petitioners

v.

CINEMARK USA, INC.,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JAMES C. HARRINGTON*
TED A. ROSS
TEXAS CIVIL RIGHTS PROJECT
2212 E. Martin Luther King Blvd.
Austin, Texas 78702-1344
(512) 474-5073

PETER HOFER
ADVOCACY, INC.
7800 Shoal Creek Blvd.
Suite 142-S
Austin, Texas 78757
(512) 454-4816

Attorneys for Petitioners
**Counsel of Record*

64 pp

QUESTIONS PRESENTED

I. Whether a stadium-style movie theater complex violates the "full and equal enjoyment" provision of Title III of the Americans with Disabilities Act (ADA) when the theaters' wheelchair seating is not a part of the stadium-seating configuration and the sight lines provided are greatly inferior to those available to the general public in the stadium-seating configuration?

II. Whether the Act's regulation providing individuals with disabilities "lines of sight comparable to those members of the general public" allows theaters to place wheelchair seating outside of the stadium-seating configuration, and whether "comparable" sight lines means only "unobstructed" sight lines, not equivalent or similar, as the word is ordinarily and commonly defined, contrary to the holding of the Court of Appeals?

III. Whether the decision of the Court of Appeals failed to give the ADA the broad reading required by this Court in *Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206 (1998), and thus adversely affects tens of thousands of Americans with physical disabilities.

IV. Whether the Court of Appeals erred in summarily reversing Petitioners' separate, supplemental claim under Texas disability law, on which Petitioners had prevailed in the trial court, without analysis or written decision?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

INTRODUCTION 1

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 5

STATEMENT OF FACTS 5

REASONS FOR GRANTING THE WRIT

1. The Fifth Circuit's Ruling Renders the ADA's "Full and Equal Enjoyment" Provision Meaningless . . .9

2. The Fifth Circuit's Interpretation of Section 4.33.3 of the ADAAG Is In Error, As It Did Not Give the Words of the Regulation Their Ordinary, Contemporary, Common Meaning 15

3. The Court of Appeals Erred in Not Separately Analyzing and Deciding Petitioners' Independent, Supplemental Claim under Texas State Disability Law, but Summarily Reversing That Claim on Which Petitioners Had Prevailed 19

CONCLUSION 23

APPENDIX A
Fifth Circuit Opinion 1a

APPENDIX B
Fifth Circuit Order Denying Petition for Rehearing En Banc 12a

APPENDIX C
District Court Judgment and Opinion 14a

APPENDIX D
District Court Award of Damages and Injunctive Relief . . .19a

APPENDIX E
Fifth Circuit Opinion on Award of Attorneys' Fees. 28a

APPENDIX F
District Court Awarding Attorneys' Fees and Costs 30a

TABLE OF AUTHORITIES

CASES

American Tobacco Co. v. Patterson
456 U.S. 63 (1982) 14
Caruso v. Blockbuster-Sony Music Entertainment Ctr.
193 F.3d 730 (3rd Cir. 1999) 18
Gorman v. Bartch
152 F.3d 907 (8th Cir. 1998) 17
Independent Living Resources v. Oregon Arena Corp.
982 F.Supp. 698 (D.Or. 1997) 18
James v. Sadler
909 F.2d 834 (5th Cir. 1990) 23
McCarthy v. Bronson
500 U.S. 136 (1991) 16
Meghrig v. KFC Western, Inc.
516 U.S. 479 (1996). 16
Molzof v. United States
502 U.S. 301 (1992). 16
Paralyzed Veterans of America v. D.C. Arena, L.P.
117 F.3d 579 (D.C.Cir. 1997) 17
Pennsylvania Department of Corrections v. Yeskey
524 U.S. 206 (1998). 13,17,18
Richards v. United States
369 U.S. 1 (1962). 14
Rubin v. United States
449 U.S. 424 (1981) 14
Sedima, S.P.R.L. v. Imrex Co.
473 U.S. 479 (1985). 17
Walters v. Metropolitan Ed. Ent., Inc.
519 U.S. 202 (1997). 16

Williams v. Taylor,
__ U.S. __, 120 S.Ct. 1479
146 L. Ed.2d 435 (2000). 16

STATUTES AND CODES

28 U.S.C. § 1254(1) 2
29 U.S.C. §792(b). 10
42 U.S.C. § 12186(b). 10
42 U.S.C. § 12186(c). 10
42 U.S.C. § 12182(a). 2,9
28 C.F.R. §36.401.. 11
28 C.F.R. pt. 36 App. A at 4.33.3 3,9,10,17
Texas Human Resources Code § 121.003 (a): 4,19
Texas Human Resources Code § 121.005 (b) 4
Tex. Rev. Civ. Stat. Ann. 9102 3

INTRODUCTION

This is, in Petitioners' view, a simple case of statutory and regulatory construction. Nevertheless, the Fifth Circuit Court of Appeals erred in its construction of the Americans with Disabilities Act ("ADA") and its regulations, and now thousands of individuals who use wheelchairs for mobility in Texas, Louisiana, and Mississippi, and in other areas of the nation, will be prevented from fully and equally enjoying one of America's favorite family pastimes, a night at the movies.

In fact, not only will these moviegoers with disabilities be denied the full and equal enjoyment of the moviegoing experience, but, for most, that experience will be painful and uncomfortable.

At its core, this case revolves around two issues: how does the "full and equal enjoyment" provision of the ADA apply to stadium-style movie theaters, and what does the Act's regulation providing patrons with disabilities "lines of sight comparable to those members of the general public" require of stadium-style theater owners?

The answer, according to the Fifth Circuit, which reversed the judgment of the district court and rendered judgment for Respondent Cinemark USA, is that the ADA and its regulations do not require that wheelchair seating be a part of the stadium-seating configuration, and "comparable" sight lines means only "unobstructed" sight lines, not equivalent or similar, as the word is ordinarily defined.

Thus, thousands of moviegoers who use wheelchairs have

no choice at stadium-style theaters but to accept what the district judge appropriately termed "the worst seats in the house."

OPINIONS BELOW

The opinion of the Court of Appeals, *Lara v. Cinemark USA, Inc.*, is reported at 207 F.3d 783 (5th Cir. 2000) (Appendix A), and the order denying rehearing *en banc* is in Appendix B. The District Court's Order Regarding Motions for Summary Judgment is in Appendix C (1998 WL 305108) and its Order Awarding Damages and Granting Injunctive Relief (1999 WL 305108) is in Appendix D. The Court of Appeals order affirming the award of attorneys' fees to Petitioners is in Appendix E, and the District Court's order, awarding fees is in Appendix F. There were two separate appeals: one on the merits, and one on attorneys' fees and costs.

JURISDICTION

The Court of Appeals for the Fifth Circuit filed its judgment on April 6, 2000, and denied Petitioners' request for rehearing and rehearing *en banc* on May 17, 2000. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title III of the Americans with Disabilities Act, 42 U.S.C. Section 12182(a):

> No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the

goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns ... or operates a place of public accommodation.

Section 4.33.3 of the Americans with Disabilities Accessibility Guidelines (28 C.F.R. pt. 36 App. A at §4.33.3):

Wheelchairs shall be an integral part of any fixed seating plan and shall be provided so as to provide people with physical disabilities a choice of admission prices and lines of sight comparable to those for members of the general public. They shall adjoin an accessible route that also serves as means of egress in case of emergency. At least one companion fixed seat shall be provided next to each wheelchair seating area. When the seating capacity exceeds 300, wheelchair spaces shall be provided in more than one location. Readily removable seats may be installed in wheelchair spaces when the spaces are not required to accommodate wheelchair users.

EXCEPTION: Accessible viewing positions may be clustered for bleachers, balconies, and other areas having sight lines that require slopes of greater than 5 percent. Equivalent accessible viewing positions may be located on levels having accessible egress.

Tex. Rev. Civ. Stat. Ann. 9102

Sec. 2. (a) The standards adopted under this article apply to

....

(4) a privately funded building or facility defined as a "public accommodation" by Section 301(7) of the Americans with Disabilities Act of 1990 (42 U.S.C. § 12181), and its subsequent amendments, that is constructed or renovated, modified, or altered on or after January 1, 1992 ....

Sec. 3. (b) It is intended to make all buildings and facilities covered by this article accessible to, and functional for, persons with disabilities to, through, and within their doors, without loss of function, space, or facilities.

Texas Human Resources Code § 121.003 (a):

Persons with disabilities have the same right as the able-bodied to the full use and enjoyment of any public facility in the state.

Texas Human Resources Code § 121.005 (b):

In addition to the [criminal misdemeanor] penalty provided in Subsection (a) of this section, a person, firm, association, corporation, or other organization, or the agent [thereof] who violates the provisions of Section 121.003 ... is deemed to have deprived a person with a disability of his or her civil liberties. The person with a disability deprived of his or her civil liberties may maintain a cause of action for damages in a court of competent jurisdiction, and there is a conclusive

presumption of damages in the amount of at least $100 to the person with a disability.

STATEMENT OF THE CASE

Petitioners, eight individuals who have physical disabilities and two private nonprofit groups that advocate for the rights of individuals with disabilities and that have members with physical disabilities, filed this civil action against Cinemark USA, Inc. ("Cinemark") for declaratory and injunctive relief, damages, and attorneys' fees under Title III of the Americans with Disabilities Act, as well as the Texas Human Resources Code.

On August 21, 1998, Chief District Judge Harry Lee Hudspeth entered summary judgment as to liability in favor of Petitioners. Judge Hudspeth subsequently awarded damages to five of the individual Petitioners ($100 each) on the separate Texas law claims, and granted injunctive relief, ordering Cinemark to modify eighteen of its twenty auditoria so that patrons in wheelchairs could access the lower part of the stadium area of the theaters. Cinemark, the owner and operator of the "Tinseltown" "stadium-style" theaters at issue, appealed.

On April 6, 2000, the Court of Appeals for the Fifth Circuit reversed the judgment of the district judge and rendered judgment for Cinemark.

STATEMENT OF FACTS

Cinemark owns and operates "Tinseltown," a twenty-screen theater complex in El Paso, Texas. All twenty theaters in the Tinseltown complex feature "stadium-style" seating for their patrons. Stadium-style movie theaters roughly emulate the seating configuration of a typical sports stadium, as the viewing auditoria are composed of a series of steps, rather than an incline or slope as found in traditional movie theaters. 2 Record on Appeal ("ROA") 317.

Also, as in a stadium, a row of seats is placed on each step all the way to the back (top) of the auditorium. *Id.* Cinemark theaters of this design further differ from the traditional incline-style theaters in that the entrance is typically at, or near, the front of the auditorium (by the movie screen), rather than at the rear. 2 ROA 317.[1]

Cinemark vigorously markets its stadium-style theaters to the public as theaters that offer an "enhanced viewing

---

1/ Other theater companies build stadium-style theaters with entrances that come into the stadium area itself, or at the back (top) of the stadium-seating configuration (6 ROA 1267-70) and thus accommodate patrons who are in wheelchairs or have mobility impairments. Regal Cinemas, for example, has been building its stadium-style movie theaters this way since January 1998. 6 ROA 1267-70. However, the Cinemark theaters at issue in this case are all accessed from the front of the theater near the movie screen, which is keeping with the general design employed by Cinemark.

experience" for moviegoers,[2] and stadium-style theaters are currently in vogue throughout the country. Most, if not all, new theaters being constructed are of stadium-style design.[3]

Cinemark can claim, and does claim through an energetic advertising program, that its elevated stadium-seating configuration offers an enhanced viewing experience for the general public because stadium-style seating eliminates the line-of-sight problems that typically occur, for example, when a tall individual sits in front of a shorter individual. It also brings the viewers closer to the movie screen itself, and at a comfortable viewing angle.

It is undisputed that individuals in wheelchairs have no means, because of the steps, to access the seats that are in the "stadium," and that Cinemark placed the wheelchair seating at Tinseltown on the level floor portion of each theater, near the entrance to the theater and close to and below the movie screen. 2 ROA 317.

There are, in other words, a few rows of seats at the very front of the theater that are not part of the stadium-seating

---

2/ Cinemark is the sixth largest motion picture exhibitor in the United States in terms of number of theaters operated. 6 ROA 1458. For the year ending December 31, 1997, Cinemark had a net income of $14.7 million. 1 ROA 113. It made $2.3 million net revenue in the second quarter of 1998 (6 ROA 1457-58), and $9.5 million net income in the third quarter of 1998 (7 ROA 1719).

3/ As Cinemark's appellate brief noted a year ago, the issues raised in this case are being vigorously litigated around the country in at least twelve separate federal cases.

configuration (i.e., overflow seating), and which do not afford the enhanced viewing experience as found in the stadium seats. Unfortunately, this is precisely where Cinemark placed the wheelchair seating at eighteen of the twenty theaters at Tinseltown.[4]

The wheelchair seats, which are on the entrance level, are so close to the movie screen that watching a movie from those locations causes physical discomfort. 3 ROA 674. The trial court, following an evidentiary hearing, found that "a person seated in the 'wheelchair row' has to lift his or her eyes and/or crane his or her neck at a very uncomfortable angle in order to view the feature on the motion picture screen." Appendix C, at 16a.

Therefore, the district judge concluded that "the wheelchair-bound patron is denied the full and equal enjoyment of the movie going experience in these theaters." *Id.* The district court also found that the wheelchair seats at issue failed to

---

4/ Cinemark contended on appeal that its wheelchair seating is in the "third row" of the auditoria, on the floor along with other "overflow" seats. The Court of Appeals unfortunately accepted this point. However, seating in the stadium is considerably different than seating located on the floor. The issue is sight angle, not distance from the screen; it is the vertical arrangement of the seats vis-a-vis the screen that accords enhanced movie viewing in stadium-style theaters.

What Cinemark means by a "row" has two meanings. One is a stadium row, a step on which seats are located. The other comprises the three overflow rows of seats on the floor between the stadium area and directly in front of the movie screen. This is where the wheelchair seating is located, not in the stadium area, where the vast majority of patrons sit.

provide individuals who use wheelchairs lines of sight comparable to those enjoyed by the general public, in violation of 28 C.F.R. pt.36, App.A at 4.33.3 ("Section 4.33.3") (1999). Appendix C.

Subsequently, after two remedy hearings, the district court entered its "Order Awarding Damages and Granting Injunctive Relief." The rather mild Order required Cinemark to modify eighteen of its theaters by moving the wheelchair seating further back from the screen and higher off the floor. Cinemark was also required to modify the theaters by lowering the screen by approximately one foot.[5] The district court also awarded $100 in statutory damages under the Texas disability law to each of the individual Petitioners who use wheelchairs for mobility, as well Petitioners' attorneys' fees.

REASONS FOR GRANTING THE WRIT

3. The Fifth Circuit's Ruling Renders the ADA's "Full and Equal Enjoyment" Provision Meaningless

Title III of the ADA provides that: "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accom-

---

5/ The retrofitting plan adopted by the judge was proposed by Cinemark, and less expensive and comprehensive than what Petitioners had proposed. Given Cinemark's resources, the modifications ordered by the district judge are not particularly costly; nor did Cinemark argue such.

modation by any person who owns ... or operates a place of public accommodation." 42 U.S.C. § 12182(a).

The responsibility for issuing regulations to enforce this mandate was delegated by Congress to the Department of Justice ("DOJ"). 42 U.S.C. § 12186(b). Accordingly, the DOJ, along with the Architectural and Transportation Barriers Compliance Board ("Access Board"), issued ADA Accessibility Guidelines ("ADAAG").[6] *See* 29 U.S.C. 792(b).

Section 4.33.3 of ADAAG, provides, in relevant part, that in assembly areas:

> Wheelchairs shall be an integral part of any fixed seating plan and shall be provided so as to provide people with physical disabilities a choice of admission and lines of sight comparable to those for members of the general public.

ADAAG, 28 C.F.R. pt. 36, App.A at 4.33.3 (1999).

The district court, after considering the evidence, held that the wheelchair seating at Tinseltown, which was not a part of the stadium-seating configuration, denied moviegoers who use wheelchairs the full and equal enjoyment of the movie going experience, and that the theaters did not provide wheelchair

---

6/ The Justice Department has adopted ADAAG Guidelines as regulations and refers to them as Justice Department Standards of Accessible Design (JDSAD). 42 U.S.C. § 12186(c).

seating with lines of sight "comparable" to those available to the general public.[7]

On appeal, the Fifth Circuit, virtually ignored the "full and equal enjoyment" provision of the ADA, and instead concentrated on the "comparable" sight lines requirement of ADAAG. Even that provision the Court misinterpreted, holding that "lines of sight comparable" only requires that theaters provide wheelchair seats with *unobstructed* views of the screen.[8]

The court of appeals, therefore, erred when it failed to rule that the placement of wheelchair seats on the floor area of the theater, very close to and below the movie screen, violated the statutory provision mandating that individuals with disabilities fully and equally enjoy the goods, services, or facilities at issue. The appellate panel not only failed to find that the wheelchair seats, segregated from the stadium-seating configuration, violated Title III's "full and equal enjoyment" provision, but it failed to address the statutory provision at all.[9]

7/ Cinemark built these new style theaters four years after the effective date of the ADA and after comparable Texas regulations took effect.

8/ That this reading of the regulation is contrary to the common, ordinary, English language, dictionary meaning of the word "comparable" will be discussed in greater detail, *infra*.

9/ The Tinseltown theaters fall into the "new construction" category for ADA purposes because they were constructed after January 26, 1993. All new construction must be readily accessible to,

(continued...)

The evidence adduced at the trial easily supports a finding that the wheelchair seating at Tinseltown discriminates against individuals with disabilities in the "full and equal enjoyment" of the goods or services offered by Cinemark, that is, the moviegoing experience. For example, the district judge noted that while the general public could choose to sit in any row, Tinseltown confined individuals with wheelchairs to an area outside the stadium-seating configuration, and that these wheelchair seats offered an "average viewing angle ... above thirty-five degrees, which Plaintiffs' expert has properly described as 'well into the discomfort zone.'" Amended Order Regarding Motions for Summary Judgment, Appendix C, at 17a. "It should be stressed," the trial court continued,

> that this is not some abstract scientific theory which is difficult for the lay person to comprehend. It simply means that a person seated in the "wheelchair row" has to lift his or her eyes and/or crane his or her neck at a very uncomfortable angle in order to view the feature on the motion picture screen. For the disabled patron, therefore, "Tinseltown" becomes "Headache City."

Id. at 16a.[10]

9(...continued)
and usable by, persons with disabilities. 28 C.F.R. §36.401. Even after suit was filed, Cinemark continued to build the same model all across the country. 4 ROA 787-89; 6 ROA 1267-70.

10/ The trial evidence was undisputed that the angles of vision available to wheelchair users in the theaters at issue are as follows: in
(continued...)

The fact that the wheelchair seating in not even a part of the stadium seating alone would be sufficient to find that the full and equal enjoyment of the goods and services is denied to moviegoers in wheelchairs, not to mention that the wheelchair seats provide viewing angles far inferior to those seats available to the general public within the stadium-seating configuration.

Despite all this evidence, the court of appeals ignored the district judge's ruling that "[t]he wheelchair-bound patron is denied the full and equal enjoyment of the movie going experience in these eighteen theaters." *Id.* The appellate court, therefore, erred when it failed to address this aspect of

---

10(...continued)
prototype A theaters, 45°; in prototype B theaters, 36°; in prototype D, 41°; in prototype E theaters, 43°; and, in prototype F theaters, 37°. 3 ROA 674. The average angle of vision available to wheelchair users in the Tinseltown theaters in question is 41°. *Id.* at 675. However, for patrons generally in the stadium area, the average angle of vision from the middle of those theaters is 20°. *Id.* Petitioners offered evidence from three independent, uninterested sources that angles of vision of greater than 30° are not recommended, and cause physical discomfort. 5 ROA 1188-89.

An Engineering Guideline of the Society of Motion Picture and Television Engineers (SMPTE EG-18-1994) introduced at trial indicated that, as of March 25, 1994 (three years before Cinemark built Tinseltown), members of the industry acknowledged physical discomfort occurred when patrons had a viewing angle greater than 35°. This fact, as noted by Judge Hudspeth, is not "some abstract scientific theory." Appendix C, at 16a. The SMPTE guideline also noted the greater potential viewing distortion, the closer to the screen the viewer sat. As noted later, *infra* n.16, both Texas and Louisiana have now adopted the SMPTE guideline as part of their state disability regulations.

the district court's order, and in so doing, rendered the ADA's full and equal enjoyment provision a nullity, violated the intent of Congress, and this Court's mandate in *Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206 (1998), to give the ADA a broad and expansive reading, as contemplated by Congress.

Certainly, the stadium-seating configuration, which offers an enhanced viewing experience, is the essential feature of Tinseltown's theaters. By not allowing people in wheelchairs and those with serious mobility impairments to sit in the stadium-seating area of its El Paso theaters, Cinemark denies people with disabilities the ability to participate in the essential feature that Cinemark offers to the public generally.

Because the wheelchair seats are segregated from the stadium-style seats, Cinemark thus denies moviegoers who use wheelchairs the "full and equal enjoyment" of the movie going experience. The plain language of the statute compels such a result, and the plain language of the statute controls its construction. *Rubin v. United States*, 449 U.S. 424, 430 (1981). The strong presumption is "that the legislative purpose is expressed by the ordinary meaning of the words used." *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982); *Richards v. United States*, 369 U.S. 1, 9 (1962).

Using this standard, Cinemark fails to provide Petitioners the full and equal enjoyment of its goods and services.[11] As

---

11/ Cinemark made much of the fact, and the Court of Appeals noted, that inspectors, operating under contract with the Texas (continued...)

such, this Court should remand this case to the Fifth Circuit for a ruling on whether Cinemark violated Petitioners' rights under Title III's full and equal enjoyment provision.

2. The Fifth Circuit's Interpretation of Section 4.33.3 of the ADAAG Is In Error, as It Did Not Give the Words of the Regulation Their Ordinary, Contemporary, Common Meaning

The district judge found that the wheelchair seats offered at Tinseltown did not afford "lines of sight comparable to those for members of the general public," as required by Section 4.33.3 of the ADAAG. The district court, after noting this was a case of first impression, stated as follows:

> Although case law would be helpful, the Court finds that it is not necessary, because the statute and regulation appear to be clear and unambiguous, and the words can be interpreted in their common, ordinary, English language dictionary meaning. "Comparable"

11(...continued)
Department of Licensing and Regulation (TDLR), approved Tinseltown as compliant with Texas disability law standards. However, after each inspection, Cinemark received a letter clearly stating that the inspections did "not address applicability of the Americans with Disabilities Act (ADA)." (Record Excerpts, 1 ROA 157, 2 ROA 449, 4 ROA 814). Nor did any of the inspectors perform any line-of-sight analysis (Record Excerpts, 2 ROA 342, 456) or find that it provided wheelchair users with a comparable line of sight (Record Excerpts, 4 ROA 808). Cinemark spent considerable time and money to ensure maximum viewing enjoyment to the public at large, but ignored the ADA.

> simply means capable of being compared; equivalent or similar. The Plaintiffs contend that this language means that wheel-chair bound patrons should and must be afforded seating providing lines of sight at least similar to those afforded the average patron of the theater rather than being relegated to the worst seats in the house.
>
> The Court agrees with the Plaintiffs' interpretation of the word "comparable" as used in the regulation, and also finds from the summary judgment evidence that the present configuration of the eighteen Tinseltown theaters does not afford wheelchair-bound patrons comparable lines of sight.

Amended Order Regarding Motions for Summary Judgment, Appendix C, at 16a.

Despite the plain language of the regulation, the Fifth Circuit ruled that "comparable" does not mean similar or equivalent, but rather "unobstructed." This Court has instructed that the words of a statute or regulation are to be given their "ordinary, contemporary, common meaning ...." *Williams v. Taylor*, __ U.S. __, 120 S.Ct. 1479, 1482, 146 L. Ed.2d 435 (2000); *Walters v. Metropolitan Ed. Ent., Inc.*, 519 U.S. 202, 207 (1997). To determine a term's plain meaning, courts routinely consider dictionary definitions, the common understanding of the term, and the context in which the term is employed.[12]

12/ *See, e.g., Meghrig v. KFC Western, Inc.*, 516 U.S. 479, (continued...)

In this case, the term comparable is at issue, as Section 4.33.3 of the ADAAG, provides, in relevant part, that in assembly areas:

> Wheelchairs shall be an integral part of any fixed seating plan and shall be provided so as to provide people with physical disabilities a choice of admission and lines of sight *comparable* to those for members of the general public.

ADAAG, 28 C.F.R. pt. 36, App.A at 4.33.3 (emphasis added). Whereas the district judge employed the ordinary, common, dictionary meaning of the term "comparable" (i.e., equivalent or similar), the court of appeals chose instead to interpret comparably to mean "unobstructed." The court of appeals' interpretation was in error as it rejects the common understanding of the term.

Added to this "common understanding" rule of construction is this Court's broad and expansive rule it applied to ADA cases in *Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206 (1998): the fact that the ADA can be "'applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.'" *Id.* at 212, citing *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985) (citation omitted). *See also Gorman v. Bartch*, 152 F.3d 907, 912 (8th Cir. 1998).

12(...continued)
485 (1996); *Molzof v. United States*, 502 U.S. 301, 307 (1992); *McCarthy v. Bronson*, 500 U.S. 136, 139 (1991).

The Fifth Circuit ignored these rules of construction and reached its erroneous interpretation by focusing on other cases where the question was, in fact, whether the "lines of sight comparable" phrase requires sight lines unobstructed by standing spectators.[13] What the court failed to recognize, however, is that the common, ordinary meaning of the term "comparable"--similar or equivalent--could encompass both obstruction and "viewing angle," as sight lines similar to those of the general public would be both unobstructed and have a similar viewing angle to the screen. But by limiting the meaning of "comparable" to only "unobstructed," the appellate court relegated moviegoers with wheelchairs to seating locations with lines of sight that are in no way similar or equivalent to the lines of sight provided to the general public. By so doing, the court of appeals also failed to give the ADA the breadth that this Court required in *Yeskey*.

Not only this, but the Fifth Circuit's logic leads to even more problematic interpretations. Thus, under its narrow view of the ADA and ADAAG, Cinemark legally could place its wheelchair seating perpendicular to the movie screen, and so

---

13/ *See, e.g., Paralyzed Veterans of America v. D.C. Arena, L.P.*, 117 F.3d 579, 583-84 (D.C.Cir. 1997) (holding that Section 4.33.3 requires auditorium owners to provide wheelchair areas with lines of sight unobstructed by standing spectators); *Caruso v. Blockbuster-Sony Music Entertainment Ctr.*, 193 F.3d 730, 736 (3rd Cir. 1999) (holding that 4.33.3 does not reach issue of sight lines over standing spectators); *Independent Living Resources v. Oregon Arena Corp.*, 982 F.Supp. 698, 743 (D.Or. 1997) (holding that Section 4.33.3 does not purport to decide whether lines of sight over standing spectators is required to comply with the ADA).

long as the view was not "obstructed," it would be considered comparable and thus in compliance with the law. This cannot be what Congress sought to accomplish with a law as comprehensive as the ADA, or what the Access Board meant in adapting Section 4.33.3 of the ADAAG to help give meaning to, and understanding of, the "full and equal enjoyment" provision of the ADA.

The result is that the Fifth Circuit has sanctioned Cinemark's giving moviegoers in wheelchairs no choice at its stadium-style theaters but to accept what the district judge appropriately termed "the worst seats in the house." Their family members and friends must join them in this inferior seating arrangement, or sit apart. [14]

3. The Court of Appeals Erred in Not Separately Analyzing and Deciding Petitioners' Independent, Supplemental Claim under Texas State Disability Law, but Summarily Reversing That Claim on Which Petitioners Had Prevailed

Not only did the court of appeals virtually ignore the "full and equal enjoyment" mandate of Title III of the ADA, it wholly failed to separately address the independent supplemental state disability law claim on which Petitioners also pre-

---

14/ Margarita Lightbourne-Harbeck, who uses a wheelchair or battery-powered chair, testified that, because she was so close to the screen, her grandchildren would not sit with her at Tinseltown, but wanted to go up in the stadium area. This also made it impossible for her to supervise them. 9 ROA (Transcript of Hearing on Plaintiffs' Motion for Preliminary Injunction, p.80).

vailed. Petitioners succeeded on this claim, in addition to the ADA claim, and the district judge awarded $100 to each Petitioner who uses a wheelchair, as allowed by Texas law. Texas Human Resources Code § 121.003(a). This Court should restore the district court's decision on this claim.

Petitioners' state law claim involved the regulations promulgated by the Texas Department of Licensing and Regulation ("TDLR"). Through its rulemaking power under the Texas Architectural Barriers Act, TDLR has promulgated Texas Accessibility Standards ("TAS") that are as stringent as, and sometimes more stringent than, the federal ADAAG standards. The provision in TAS, Section4.33.3, applies to comparable lines of sight. TAS § 4.33.3 parallels ADAAG § 4.33.3, but offers more specific guidance than ADAAG § 4.33.3 through specific examples in the Appendix to the rule (TAS §A4.33.3).

Specifically, as noted in the record, TAS offers examples about stadium-area seating. Had Cinemark heeded the TAS provisions, it would have noted the examples in the TAS Appendix that TDLR prepared to help businesses understand the application of the TAS line-of-sight rule. They state in part:

> A4.33.3 Placement of Wheelchair Locations. *In determining appropriate locations for wheelchair spaces, consideration should be given to ensure that sight lines are maintained for persons seated in wheelchairs during events where the tendency of the general audience may be to stand, either momentarily or for extended periods.* The location of wheelchair

areas can be planned so that a variety of positions within the seating area are provided. This will allow choice in viewing and price categories. *Examples of comparable and incomparable locations are:*

> *(1) Wheelchair locations on each side of a football stadium or gymnasium and located within one-third of either side of the center line of the playing surface and at levels consistent with the regular seating and distributed amongst the seating options would be comparable....*
>
> *(3) If regular seating is raised above the playing surface, wheelchair spaces located on the playing surface would not be considered comparable unless they were in addition to other accessible wheelchair spaces located within the regular raised seating areas.*
>
> *(4) Spaces located beyond the end zone of a football stadium or behind the basketball court goals in a gymnasium, even from a lofted area, would not be considered comparable unless they were in addition to other accessible and comparable seating serving the same facility....*

(emphasis in original).

These three examples make clear that TAS prohibits assigning wheelchair seating in areas with extreme viewing

angles.[15] A sight line from such an area is not comparable, according to TAS. Rather, wheelchair seating has to be part of the regular seating and in a middle, average seating location.[16]

Cinemark spent much time and expertise in ensuring maximum viewing enjoyment to the public at large, but it simply ignored TAS, which requires Cinemark to provide patrons who use wheelchairs the same viewing experience that it provided to moviegoers without disabilities.[17]

15/ Had Cinemark paid more attention to the TAS light-of-sight examples, it might have done a better job of complying with the ADA as well.

16/ Subsequent to this litigation, TDLR published a guidance (Technical Memorandum 99-01) regarding comparable line of sight, specifically applying Engineering Guideline 18-1994 of the Society of Motion Picture and Television Engineers (SMPTE) and requiring that the viewing angle not exceed 30°-35° vertically. *See* http://www.license.state.tx.us/AB/Techmemos.htm. This Court may take judicial notice of this, pursuant to Federal Rule of Evidence 901(b)(7). The Louisiana Fire Marshall has also adopted the SMPTE guideline. *See* Louisiana Department of Public Safety and Corrections, Office of State Fire Marshall issued Formal Interpretation 98-1 (Accessible Seating: Motion Picture Lines of Sight).

17/ As noted earlier, *supra* n.11, Cinemark made much of the fact that inspectors, operating under contract with TDLR, approved Tinseltown as compliant with Texas disability law standards. However, none of the inspectors performed any line of sight analysis (2 ROA 342, 456) or found that Tinseltown provided wheelchair users with a comparable line of sight (4 ROA 808). Nor did Cinemark ask TDLR to make such an evaluation. *Id.* The trial judge was also unpersuaded by Cinemark's argument and ruled against it on this

(continued...)

The court of appeals did not address this issue, and Petitioners urge that the judgment of the district court be affirmed because the district judge correctly applied Texas law.

Finally, this Court should note that the state law claim is separate and distinct from Petitioners' ADA claims. The Texas law violation is based on Cinemark's denying people with mobility impairments the same rights that able-bodied persons have to the full use and enjoyment of a public facility. This is a cause of action on which Petitioners prevailed independently of their success under the ADA.

The court of appeals did not address this at all. Given the state of the record, the court of appeals should have had no choice but to uphold this part of the trial court judgment. *James v. Sadler*, 909 F.2d 834 (5th Cir. 1990).

CONCLUSION

The issue of the accessibility of stadium-style seating is being litigated in numerous cases in district courts around the country, and will affect hundreds of thousands of Americans with mobility disabilities and in wheelchairs. Those courts will look to this Court for guidance in its approach to protecting the rights of people with disabilities under Title III of the Americans with Disabilities Act.

Unless this Court acts, the decision of the Court of Appeals will stand, to the detriment of people with disabilities in the

---

17(...continued)
issue.

Fifth Circuit and to the detriment of people in other parts of the country as other federal and state courts will look to the Fifth Circuit's decision for precedent.

Therefore, Petitioners respectfully request that the Court hear this case, and, upon doing so, reverse the appellate court and accord Petitioners the vindication they sought and achieved at the trial court.

Petitioners also respectfully request that this Court summarily affirm the judgment in their favor on the independent supplemental Texas disability law claim. They are entitled to this as a matter of law.

Respectfully submitted,

JAMES C. HARRINGTON
Counsel of Record
TED A. ROSS
TEXAS CIVIL RIGHTS PROJECT
2212 E. Martin Luther King Blvd.
Austin, Texas 78702-1344
(512) 474-5073

PETER HOFER
ADVOCACY, INC.
7800 Shoal Creek Blvd.
Suite 142-S
Austin, Texas 78757
(512) 454-4816

Attorneys for Petitioners

August 14, 2000

APPENDIX A

United States Court of Appeals
Fifth Circuit

[Filed April 6, 2000]

Jose G. Lara, E. J. Lozano, Alfredo Juarez, G. Tim Hervey, Earl L. Harbeck, Volar Center for Independent Living, Luis Enrique Chew, Desert Adapt, Myra Murillo, Margarita Lightbourne-Harbeck, Plaintiffs-Appellees,	)	No. 99-50204
v.	)	
Cinemark USA, Inc., Defendant-Appellant.	)	

Rehearing and Rehearing en Banc Denied May 17, 2000.

Before POLITZ, GARWOOD and DAVIS, Circuit Judges.

W. EUGENE DAVIS, Circuit Judge:

Defendant-Appellant Cinemark USA, Inc. challenges the district court's determinations that the Americans with Disabilities Act ("ADA") requires "stadium-style" movie theaters to offer wheelchair-bound patrons lines of sight comparable to those enjoyed by the general public and that

Cinemark's theaters failed to provide such sight lines.[1] For the reasons that follow, we hold that although the ADA does impose such a requirement, the district court erred in concluding that Cinemark failed to meet its obligations under the Act. Accordingly, we reverse the judgment of the district court.

I.

Cinemark owns and operates "Tinseltown," a twenty-screen theater complex located in El Paso, Texas. All twenty of the individual theaters in the complex provide "stadium-style" seating. Stadium-style theaters roughly emulate the seating configuration of a typical sports stadium, providing stepped-seating that rises at a slope of well over five percent. This elevated seating configuration eliminates the line-of-sight problems that typically occur, for example, when a tall individual sits in front of a shorter individual.

Tinseltown provides wheel-chair accessible seating in its theaters, but not as a part of the stadium-seating configuration. Because stadium seating requires a steep grade, which is virtually inaccessible to wheelchairs, Tinseltown placed its wheelchair seating on a flat portion of each theater, located near the front of the seating area. The wheelchair seating placements are surrounded on all sides by general public seating, which, according to Tinseltown, is used even when other seating is available.

---

[1] Cinemark also argues that the district court abused its discretion by denying Cinemark's motions to compel the depositions of DOJ officials, by failing to strike Plaintiffs' experts, by permitting certain evidence into the record, and by ordering burdensome remedial relief. Because we conclude that the district court erred in interpreting the ADA, we need not address these issues.

In constructing the Tinseltown theaters, Cinemark submitted the architectural plans to the Texas Department of Licensing and Regulation ("TDLR`") and the City of El Paso. The city inspectors reviewed the design plans, including wheelchair placements, and granted the theater conditional approval to go ahead with the plans. The city submitted this conditional approval to the TDLR. Cinemark completed construction of the theater in September 1997, and the city and state inspected the completed facilities. The city and state inspectors approved the theaters' seating configurations, including the wheelchair placements.

Shortly after Tinseltown opened, a group of disabled individuals and two advocacy groups ("Plaintiffs") brought suit, alleging that eighteen of Tinseltown's twenty theaters violated the ADA. Plaintiffs alleged that in these theaters, Cinemark located the wheelchair accessible areas too near the screen and too far below screen-level to provide wheelchair-bound moviegoers with comfortable viewing. They contend that while Tinseltown's stadium seating affords non-disabled patrons improved lines of sight, the theaters relegate wheelchair-users to inferior seating areas, where they must uncomfortably crane their necks to watch movies.

Both parties filed motions for summary judgment and the district court entered judgment for the Plaintiffs. The court found that "a person seated in the 'wheelchair row' has to lift his or her eyes and/or crane his or her neck at a very uncomfortable angle in order to view the feature on the motion picture screen." Therefore, the court concluded that "the wheelchair-bound patron is denied the full and equal enjoyment of the movie going experience in these theaters."

Subsequently, the district court held two remedy hearings. After considering testimony and argument, the district court

entered an "Order Awarding Damages and Granting Injunctive Relief." The order required Cine-mark to modify eighteen of its theaters by moving the wheelchair seating location further back from the screen and higher off the floor, and by lowering the screen by approximately one foot. The court also granted attorneys fees to each of the plaintiffs and $100 in damages to each of the individual wheelchair- bound plaintiffs.

Cinemark's principal argument on appeal is that the district court incorrectly interpreted and applied the ADA and the ADA Guidelines promulgated pursuant to the Act. We now turn to those arguments.

II.

We review the district court's interpretation of the statute de novo. See *Woodfield v. Bowman*, 193 F.3d 354, 358 (5th Cir.1999).

Title III of the ADA provides that: "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns ... or operates a place of public accommodation." 42 U.S.C. § 12182(a). Congress delegated to the Department of Justice the responsibility for issuing regulations in order to enforce this mandate. 42 U.S.C. § 12186(b). Accordingly, the DOJ, in conjunction with the Architectural and Transportation Barriers Compliance Board ("Access Board"), issued ADA Accessability Guidelines ("ADAAG").[2] At the center of this litigation is Section 4.33.3

---

[2] The Department of Justice did not draft the language in the ADAAG. Rather, Congress has charged the Access Board with "establish[ing] and maintain[ing] minimum guidelines and requirements for the standards issued pursuant to" Title III of the Act.

of the ADAAG, which provides that in assembly areas:

> Wheelchairs shall be an integral part of any fixed seating plan and shall be provided so as to provide people with physical disabilities a choice of admission prices and lines of sight comparable to those for members of the general public. They shall adjoin an accessible route that also serves as means of egress in case of emergency. At least one companion fixed seat shall be provided next to each wheelchair seating area. When the seating capacity exceeds 300, wheelchair spaces shall be provided in more than one location. Readily removable seats may be installed in wheelchair spaces when the spaces are not required to accommodate wheelchair users.
>
> EXCEPTION: Accessible viewing positions may be clustered for bleachers, balconies, and other areas having sight lines that require slopes of greater than 5 percent. Equivalent accessible viewing positions may be located on levels having accessible egress.

ADAAG, 28 C.F.R. pt. 36, App. A at 4.33.3 (1999).

The district court held that Cinemark violated section 4.33.3 because its Tinseltown theaters failed to provide wheelchair-bound patrons with "lines of sight comparable to those for members of the general public." The court noted that while the general public could choose to sit in any row, Tinseltown confined wheelchair-bound patrons to an area with an "average viewing angle ... [of] above thirty-five degrees, which the Plaintiff's expert witness has properly described as

---

29 U.S.C. § 792(b). The DOJ adopted these standards in toto pursuant to Congress's insistence that the DOJ's regulations be "consistent with the minimum guidelines and requirements issued by" the Board. See 42 U.S.C. § 12186(c).

'well into the discomfort zone.' "

Cinemark argues both that section 4.33.3 does not apply to its theaters and, alternatively, that it provides wheelchair-users with comparable lines of sight.

A.

Cinemark first argues that the "lines of sight comparable" provision of section 4.33.3 only applies to theaters with a capacity of over 300 seats. Cinemark posits that section 4.33.3, when read as a whole, requires only that theaters with over 300 seats provide handicapped patrons with "the choice of admission prices and lines of sight comparable to" to those enjoyed by the general public. Emphasizing the phrase "choice of," Cinemark argues that section 4.33.3 simply imposes a dispersal requirement, requiring larger auditoria to provide wheelchair-users with a variety of admission prices and viewing locations. Cinemark explains that the DOJ's goal of dispersal could not be accomplished by simply requiring a "choice of admissions prices," because many large auditoria, such as college sports venues, charge a single admission price even for different viewing locations. Cinemark concludes that because the regulation explicitly permits theaters with seating capacities under 300 to provide wheelchair seating in a single area, its theaters are exempt from dispersal, and hence, the entire regulation.[3]

---

[3] Cinemark also invokes Section 4.33.3's exemption for "bleachers, balconies, and other areas having sight lines that require slopes of greater than 5 percent." ADAAG § 4.33.3. In these areas, "equivalent accessible viewing positions may be located on levels having accessible egress" and may be clustered. Id. Cinemark notes that its stadium-style seating requires a slope well in excess of five percent and argues that it is therefore exempt from section 4.33.3.

In interpreting a statute or regulation, we first look to the statute or regulation's plain language. *See United States v. Raymer*, 876 F.2d 383, 389 (5th Cir.1989). Moreover, we must consider the regulation as a whole, with the assumption that the Department intended each of the regulation's terms to convey meaning. *Bailey v. United States*, 516 U.S. 137, 143-45, 116 S.Ct. 501, 133 L.Ed.2d 472 (1995). Based on such a reading of the regulation, we cannot agree that the "lines of sight" language demands nothing more than mere dispersal.

First, the "lines of sight" language is entirely divorced from the dispersal requirement. The provision requiring multiple seating locations comes at the end of the regulation and does not in any way modify the earlier requirements.

Second, the phrase "choice of" modifies only "admissions prices" and not "lines of sight." Indeed, the DOJ has consistently treated "comparable choice of admission prices" and "comparable lines of sight" as two separate requirements. *See, e.g.*, ADAAG, 28 C.F.R. pt.36, App.B at 650 (1999)("the final rule adds ... a requirement that ... wheelchair seating provide lines of sight and choice of admission prices comparable to those for the general public"); 1994 DOJ Technical Assistance Manual ("TAM") Supp. § III- 7.5180 ("In addition to requiring ... dispersion of wheelchair locations, ADAAG requires that wheelchair locations provide people with disabilities lines of sight comparable to those for members of the general public."). Regardless of whether the DOJ's interpretation demands deference, these statements demonstrate that, since the inception of section 4.33.3, the

---

The 5 percent slope exemption, however, permits only the clustering of seats. It does not permit Cinemark to avoid section 4.33.3's comparable line of sight requirement.

Department has consistently treated "choice of admissions prices" and "lines of sight" as two separate requirements. Cf. *Paralyzed Veterans of America v. D.C. Arena*, L.P., 117 F.3d 579, 588 (D.C.Cir.1997) (holding that the Department's TAM is entitled to deference).

Third, Cinemark's interpretation effectively reads out the opening clause of the "lines of sight" portion of section 4.33.3, which explains that "wheelchairs shall be an integral part of any fixed seating plan and shall be provided so as to provide people with physical disabilities with a choice of ... lines of sight comparable to those for members of the general public." (emphasis added).

Finally, by applying section 4.33.3 only in instances where seating capacity exceeds 300, Cinemark would permit smaller theaters to avoid all of the placement requirements of the section, including its demand that wheelchair seating "adjoin an accessible route that also serves as a means of egress in case of emergency." Such an interpretation would contravene the very purpose of the regulation and of the ADA. Accordingly, we conclude that section 4.33.3 imposes two independent requirements: (1) that theaters with over three-hundred seats provide wheelchair spaces in more than one location, and (2) that smaller facilities provide people with physical disabilities with lines of sight and choice of ticket prices comparable to those enjoyed by the general public. Accord *Paralyzed Veterans of America*, 117 F.3d at 583 (holding that lines of sight requirement is independent of dispersal requirement).

B.

Cinemark next contends that its theaters do afford wheelchair-bound moviegoers with "lines of sight comparable to those for members of the general public." According to

Cinemark, the wheelchair areas are "comparable" because they are located in the midst of general seating and do not suffer from any obstructions.

The text of section 4.33.3 provides little guidance as to whether theaters must provide wheelchair-bound moviegoers with comparable viewing angles or simply unobstructed lines of sight. And although a number of courts have considered whether section 4.33.3 requires auditoria to provide wheelchair seating areas with lines of sight that are unobstructed by standing spectators, no court has considered whether theaters must provide those seating areas with "viewing angles" that are as comfortable as those enjoyed by the general public. *See, e.g., Paralyzed Veterans,* 117 F.3d at 583-4 (holding that 4.33.3 does require auditorium-owners to provide wheel-chair areas with lines of sight unobstructed by standing spectators); *Caruso v. Blockbuster-Sony Music Entertainment Ctr. at the Waterfront*, 193 F.3d 730, 736 (3d Cir.1999)(holding that 4.33.3 does not reach issue of sightlines over standing spectators); *Independent Living Resources v. Oregon Arena Corp.*, 982 F.Supp. 698, 743 (D.Or.1997)(holding 4.33.3 "does not purport to decide whether lines of sight over standing spectators are--or are not--necessary in order to comply with the ADA").

Unlike questions of "viewer obstruction," which the DOJ and Access Board explicitly considered before issuing section 4.33.3, *see* 56 Fed.Reg. 2296, 2314 (1991); 56 Fed.Reg. 35408, 35440 (1991), questions regarding "viewing angle" did not arise until well after the DOJ promulgated section 4.33.3. Similarly, while the DOJ's 1994 Technical Assistance Manual explicitly requires theaters to provide "lines of sight over spectators who stand," the manual does not address problems involving viewing angles. See 1994 DOJ TAM

Supp. § III- 7.5180. Indeed, the Access Board has just recently proposed modifying section 4.33.3 to require explicitly that auditoria provide wheelchair-users with unobstructed lines of sight. 64 Fed.Reg. 62248, 62277-78 (Nov. 16,1999). As the Access Board explained:

> DOJ has asserted in attempting to settle particular cases that wheelchair seating locations [in stadium-style theaters] must: (1) be placed within the stadium-style section of the theater... (2) provide viewing angles that are equivalent or better than the viewing angles... pro-vided by 50 percent of the seats in the auditorium, counting seats of any type sold in that auditorium; and (3) provide a view of the screen, in terms of lack of obstruction ... that is in the top 50 percent of all seats of any type sold in the auditorium. The Board is considering whether to include specific requirements in the final rule that are consistent with the DOJ's interpretation of 4.33.3 to stadium-style movie theaters.

64 Fed.Reg. at 62278. Significantly, the proposed regulations define "line of sight" problems only in the context of obstructed views, and recognize that additional language will be necessary to codify the DOJ's litigating position. *Id.*

Moreover, although it appears that at the time DOJ adopted Section 4.33.3, the phrase "lines of sight" lacked a clear meaning in the ADA context, it is clear that in a number of other contexts, the phrase meant unobstructed view. *See, e.g.*, 47 C.F.R. §73.685 (2000) (FCC regulation requiring that antennae have line of sight, without obstruction, of the communities that they serve); 46 C.F.R. §13.103 (2000)(defining direct supervision as having line of sight of the person being supervised); 36 C.F.R. §2.18 (2000)(forbidding people under age 16 from operating snowmobiles unless they are "within line of sight" of a responsible person over age 21).

In light of the lack of any evidence that the Access Board intended section 4.33.3 to impose a viewing angle requirement, the Board's recent statement that it had not yet decided whether to adopt the DOJ's litigating position with respect to stadium-style theaters, and the common meaning of "lines of sight," we cannot conclude that the phrase "lines of sight comparable" requires anything more than that theaters provide wheelchair-bound patrons with unobstructed views of the screen. To impose a viewing angle requirement at this juncture would require district courts to interpret the ADA based upon the subjective and undoubtedly diverse preferences of disabled moviegoers. Congress granted the DOJ, in conjunction with the Access Board, the authority to promulgate regulations under the ADA in order to provide the owners and operators of places of public accommodation with clear guidelines for accommodating disabled patrons. *See generally* House Report No. 101- 485(I), at 124-25, 138-39 (1990), reprinted in 1990 U.S.C.C.A.N. 407-08, 421-22. Accordingly, in the absence of specific regulatory guidance, we must hold that section 4.33.3 does not require movie theaters to provide disabled patrons with the same viewing angles available to the majority of non-disabled patrons.

Plaintiffs neither contend that Tinseltown's wheel-chair-accessible seating suffers an obstructed view, nor dispute that Tinseltown located the wheelchair seating amidst general public seating. As such, the district court erred, as a matter of law, in finding that Cinemark failed to provide wheelchair-bound patrons with lines of sight comparable to those for members of the general public.

III.

For the foregoing reasons, the judgment of the district court is REVERSED and judgment is RENDERED for Defendants.

APPENDIX B

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

[Filed May 17, 2000]

JOSE G. LARA, E. J. LOZANO, ALFREDO JUAREZ, G. TIM HERVEY, EARL L. HARBECK, VOLAR CENTER FOR INDEPENDENT LIVING, LUIS ENRIQUE CHEW, DESERT ADAPT, MYRA MURILLO, MARGARITA LIGHTBOURNE-HARBECK, Plaintiffs-Appellants,	)	No.99-50204
v.	)	
CINEMARK USA, INC., Defendant-Appellee.	)	

Appeal from the United States District Court
for the Western District of Texas

ON PETITION FOR REHEARING EN BANC

(Opinion 4/6/00, 5Cir._____,_____F.3d_____)

Before POLITZ, GARWOOD and DAVIS, Circuit Judges.

PER CURIAM*:

Petitioners Lara et al. seek rehearing on a number of rounds including a complaint that the panel failed to address their "separate supplemental state disability law claim.

I

In entering summary judgment for Plaintiffs, the district court did not address any "separate supplemental state disability law claims." In entering its order awarding damages and injunctive relief, however, the district court explained that it was awarding several of the Plaintiffs $100 in damages pursuant to §§121.003(a) and 121.004(a) of the Texas Human Resource Code. The district court obviously premised both its finding of liability and award of damages under the Texas Code exclusively upon its earlier finding of an ADA violation. The record reveals an excellent reason for this disposition. From their first complaint, through their motion for summary judgment, to their brief on appeal and oral argument, Plaintiffs have consistently treated their ADA claims and Texas state law claims as indistinct and inseparable. Accordingly, our consideration and disposition of the ADA claims also disposed of the state law claims.

For the above reasons, treating the Petition for Rehearing En Banc as Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in-regular service of the court having requested that the court be polled on Rehearing En Banc (Fed.R.App.P. and 5thCir.R.35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:
/s/ W. Eugene Davis
UNITED STATES CIRCUIT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

JOSE G. LARA, et al, Plaintiffs,	)	No. EP-97-CA-502-H
v.	)	[Filed October 21, 1998]
CINEMARK USA, INC., Defendant.	)	

AMENDED ORDER REGARDING MOTIONS FOR SUMMARY JUDGMENT AND ALLOWING INTERLOCUTORY APPEAL

This is a civil action for damages and for injunctive and declaratory relief under the Americans with Disabilities Act, 42 U.S.C. § 12181 et seq. Plaintiffs Jose G. Lara, et al, are disabled persons who complain that Tinseltown USA, a large theater complex operated by the Defendant, does not comply with the requirements of the Americans with Disabilities Act. Both the Plaintiffs and the Defendant have filed motions for summary judgment, and the Civil Rights Division of the United States Department of Justice was allowed by the Court to file a brief as amicus curiae. A hearing was held on the motions for summary judgment on August 14, 1998. After considering the motions, them briefs, the exhibits, and the arguments of counsel, the Court finds that the Defendant's motion for summary judgment should be denied and that the Plaintiffs'

motion for summary judgment should be granted.

The record reflects that Tinseltown USA is a twenty-screen, stadium style theater complex. A "stadium style" theater auditorium differs from the customary theater auditorium in that it is composed of a series of steps, like a sports arena or stadium. Also, like a stadium, a row of seats is placed on each step all the way to the back (top) of the auditorium. The stadium style auditorium also differs from the traditional "incline" type theater auditorium in that the entrance is at or near the front, rather than the rear, of the auditorium. In eighteen of the twenty Tinseltown theaters, the entrance to the auditorium is at the bottom of the steps[1]. The supposed advantage of the stadium style that theater patrons have relatively unobstructed views because the people sitting in the row just in front are on a lower level. When an able-bodied theater patron enters the auditorium, he or she climbs the desired number of steps to reach a row which will afford him or her the desired view of the motion picture screen. A wheelchair-bound patron, however, cannot climb the steps. The row set aside for occupancy by wheel-chair-bound patrons in the eighteen theaters in question is the row adjacent to, and on the same level as, the entrance[2]. The Plaintiffs complain that viewing the movie screen from the level of the entrance is very awkward and uncomfortable, because it is too close to the screen and too far below its level. In other words, the Plaintiffs say that the viewing available to them is not

---

[1] The other two Tinseltown theaters have a second entrance at the back of the auditorium, i.e., at the top of the row of steps. The design of these two theater auditoriums is not an issue in this case.

[2] The other two theaters feature a wheelchair row at the back of the auditorium, accessible by means of an elevator.

comparable to the more comfortable "line of sight" available to nondisabled patrons.

Title III of the Americans with Disabilities Act establishes the following general rule:

> No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns. ..or operates a place of public accommodation.

Title 42 U.S.C. §12182(a). Because these principles are so general, Congress delegated to the Department of Justice the responsibility for "fleshing out" the general principles by issuing appropriate regulations. 42 U.S.C. § 12186(b). The particular regulation at issue in this case is known as Standard 4.33.3 which provides in pertinent part as follows:

> Wheelchair areas shall be an integral part of any fixed seating plan and shall be provided so as to provide people with physical disabilities a choice of admission prices and lines of sight comparable to those for members of the general public.

Title 28 C.F.R. Part 36, App. A, § 4.33.3 (1996) . In this case, the Plaintiffs contend that the eighteen Tinseltown theaters violate the statute and the regulation in that the wheelchair seating that has been provided does not afford them lines of sight comparable to those provided to able-bodied theater patrons.

This is apparently a case of first impression. Neither party has cited any case in which the statute or the regulation has been interpreted with specific application to a stadium style movie theater. Although case law would be helpful, the Court finds that it is not necessary, because the statute and regulation

appear to be clear and unambiguous, and the words thereof can be interpreted in their common, ordinary, English language, dictionary meaning. "comparable" simply means capable of being compared; equivalent or similar. The Plaintiffs contend that this language means that the wheelchair-bound patrons should and must be afforded seating providing lines of sight at least similar to those afforded to the average patron of the theater rather than being relegated to the worst seats in the house.

The Court agrees with the Plaintiffs' interpretation of the word "comparable" as used in the regulation, and also finds from the summary judgment evidence that the present configuration of the eighteen Tinseltown theaters does not afford wheelchair-bound patrons comparable lines of sight. Either the row designated for wheelchair-bound patrons is too close to the screen, or the screen is too high off the ground, or a combination of both. The average viewing angle from this row is above thirty-five degrees, which the Plaintiffs' expert witness has properly described as "well into the discomfort zone". It should be stressed that this is not some abstract scientific theory which is difficult for the lay person to comprehend. It simply means that a person seated in the "wheelchair row" has to lift his or her eyes and/or crane his or her neck at a very uncomfortable angle in order to view the feature on the motion picture screen. For the disabled patron, therefore, "Tinseltown" becomes "Headache city". The wheelchair- bound patron is denied the full and equal enjoyment of the movie going experience in these eighteen theaters. Therefore, these theaters as presently configured do not conform to the requirements of the Americans with Disabilities Act and Standard 4.33.3. Accordingly, the Plaintiffs are entitled to summary judgment in their favor with

respect to liability.

An additional hearing on remedies will be required in this case. The Court notes in passing, however, that from the evidence produced so far, it might be possible to solve the problem in a significant way without extraordinary difficulty or expense. The parties are encouraged to negotiate with an eye toward settlement of the remaining issues to the extent possible. If these issues cannot be settled, the Court stands ready to make its own determination with regard to remedies.

The Court finds that this order regarding the motions for summary judgment involves a controlling question of law as to which there is substantial ground for difference of opinion, and that an immediate appeal from this order may materially advance the ultimate termination of this litigation. Therefore, the Court finds that an interlocutory appeal should be permitted pursuant to 28 U.S.C. § 1292(b).

It is therefore ORDERED that the Defendant's motion for summary judgment in the above-styled and numbered cause be, and i t is hereby, DENIED.

It is further ORDERED that the Plaintiffs' motion for summary judgment with respect to liability be, and it is hereby, GRANTED.

It is further ORDERED that the Defendant be, and it is hereby, PERMITTED to pursue an interlocutory appeal of this order pursuant to 28 U.S.C. § 1292(b).

SIGNED AND ENTERED this 21st day of October, 1998.

/s/

HARRY LEE HUDSPETH
UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

No. EP-97-CA-502-H
[Filed February 4, 2000]

JOSE G. LARA, et al.)
Plaintiff,)
)
v.)
)
CINEMARK USA, INC.,)
Defendant.)

JUDGMENT

In accordance with the order awarding damages and granting injunctive relief this day entered in the above-styled and numbered cause,

It is ORDERED, ADJUDGED and DECREED that Defendant Cinemark USA, Inc., proceed forthwith to modify the eighteen auditoriums at Tinseltown USA to bring them into compliance with the requirements of the Americans with Disabilities Act.

It is further ORDERED, ADJUDGED and DECREED that Plaintiffs Jose G. Lara, Alfredo Juarez, Earl L. Harbeck, Luis Enrique Chew, and Myra Murillo, have and recover of and from Defendant Cinemark USA, Inc. damages in the sum of

One hundred ($100.00) and no/100 DOLLARS, each, for which let execution issue.

It is further ORDERED that the Plaintiffs file their motion for attorney's fees, supported by appropriate affidavits, within fourteen days of the date of this judgment.

It is further ORDERED, ADJUDGED and DECREED that all relief prayed for by the Plaintiffs not specifically granted be, and it is hereby, DENIED.

SIGNED AND ENTERED this 4th day of February, 1999.

/s/

HARRY LEE HUDSPETH
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT
FOR THE WESTERN DISTRICT OF TEXAS

JOSE G. LARA, et al, Plaintiffs,	)	
	)	NO. EP-97-CA-502-H
v.	)	[Filed February 4, 1999]
CINEMARK USA, INC., Defendant.	)	

ORDER AWARDING DAMAGES AND GRANTING INJUNCTIVE RELIEF

This is a civil action for damages and for injunctive and declaratory relief under the Americans with Disabilities Act, 42 U.S.C. §§ 12181 et seq. The action was brought by a group of disabled persons who complain that the Defendant's El Paso theater complex, Tinseltown USA, is not in compliance with the requirements of the Americans with Disabilities Act. On June 17, 1998, this Court entered an order denying without prejudice the Plaintiffs' motion for a preliminary injunction, preferring instead to let the case proceed to a trial on the merits. Both sides then filed motions for summary judgment, and the Civil Rights Division of the United States Department of Justice was allowed by the Court to file a brief as amicus curiae. On August 14, 1998, a hearing was held on the motions for summary judgment. On August 21, 1998, the Court entered an order denying the Defendant's motion for summary judgment and granting the Plaintiffs' motion with respect to liability issues only. On October 21,1998, that order was amended to permit the Defendant to perfect an

interlocutory appeal pursuant to 28 U.S.C. § 1292(b) . The Defendant did petition the Court of Appeals for leave to file an interlocutory appeal, but on January 15, 1999, the Court of Appeals denied the petition without prejudice. In the meantime, this Court held a final hearing on remedies, and will now proceed to grant relief.

The gist of the Americans with Disabilities Act as it applies to this case is found in the following language:

> No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommo-dations of any place of public accommodation by any person who owns. ..or operates a place of public accommodation.

Title 42 U.S.C. § 12182(a) . The general language of the statute is made more specific by a regulation, known as Standard 4.33.3, which provides in pertinent part as follows:

> Wheelchair areas shall be an integral part of any fixed seating plan and shall be provided so as to provide people with physical disabilities a choice of admission prices and lines of sight comparable to those for members of the general public.

Title 28 CFR Part 36, App. A, § 4.33.3 (1996). In this case, the Plaintiff contended, and the Court found, that eighteen of the twenty Tinseltown auditoriums violated the statute and the regulation in that the wheelchair seating there provided fails to afford the disabled theater patron lines of sight comparable to those provided to able-bodied patrons. Both sides then proceeded to propose plans for retrofitting the theater auditoriums to bring them into compliance with the Americans with Disabilities Act.

The Defendant's proposal is embodied in Defendant's

Exhibit 1 which was introduced in evidence at the December 16 hearing. The Defendant's plan proposes to improve the lines of sight of wheel-chair bound patrons by (1) moving the wheelchair seating location further back from the screen and higher off the floor by ramping up to the first tiered row of seats, and (2) by lowering the screen by approximately one foot. However, for whatever reason, the Defendant proposes to modify only five of its eighteen auditoriums in accordance with this plan.

The Plaintiffs countered with a plan developed by Daniel Partida, an architect with the firm of BPLW Architecture and Engineering. The Partida plan calls for the retrofitting of all eighteen Tinseltown auditoriums. Although some features of the Partida plan are similar to some aspects of the Defendant's plan, the Partida plan is generally more radical and more expensive than the Defendant's plan. To make a long story short, however, the Plaintiffs urge the Court to order the Defendant to remodel all eighteen theater auditoriums, and to do so along the lines proposed in the Partida plan.

The two plans presented to the Court have some obvious similarities and some obvious differences. As to similarities, both plans would require each auditorium to close down, at least briefly, while the process of retrofitting is taking place, resulting in a loss of revenue to the Defendant. Both plans would also result in some permanent loss of seating capacity as a result of the retrofitting, which again would bring about some potential loss of revenue to the Defendant. As to differences, the evidence before the Court indicates a significant difference in the estimated costs of implementing these two proposals. Although these are only estimates, the anticipated cost of implementing Defendant's plan would be approximately $15,000 per auditorium, while implementing the Plaintiff's plan

would cost $22,000 per auditorium. Finally, the most obvious and glaring difference between the two plans is that the Defendant proposes to modify only five out of eighteen auditoriums, while the Plaintiffs' plan calls for modification of all eighteen.

The Defendant seeks to justify its proposal to modify only five out of eighteen auditoriums by contending that it acted "in good faith" in the construction of the Tinseltown USA complex. It is not necessary to discuss in detail the Defendant's argument in support of its position, because the Court is unable to find any "good faith" exception to the requirements of the Americans with Disabilities Act. Tinseltown USA was constructed after the effective date of the Act and the regulations, including Standard 4.33.3. The Court having found that eighteen of the twenty theater auditoriums do not comply with the requirements of the Act and the regulations, it follows that all eighteen must be modified. In this respect, therefore, the Court agrees with the Plaintiffs. On the other hand, the Court agrees with the Defendant that its plan to modify auditoriums, if applied to all eighteen auditoriums, would be adequate and sufficient to comply with the requirements of the Act for the accommodation of wheelchair bound patrons.

The Defendant has explained that the eighteen auditoriums at issue in this case fall into five different size categories[1]. The Defendant proposes to retrofit only one auditorium of each size[2]. As previously noted, however, modifying only five out

---

[1] Two of the twenty Tinseltown auditoriums are not at issue in this case. They happen to be the two largest, each containing 552 seats. No modifications are required with respect to these two auditoriums.

[2] The auditoriums selected by the Defendant are identified as auditoriums 3, 7, 8, 9, and 10.

of eighteen auditoriums to bring them into compliance with the Americans with Disabilities Act is not satisfactory. The law requires all eighteen to be modified. Since the Defendant has developed a plan for modification of each of the five types of auditoriums, expanding that to all eighteen will be a simple matter. It will be more time consuming and expensive than modifying only five auditoriums, but will require little or no additional planning. The Defendant will be ordered to proceed forthwith to modify those eighteen auditoriums along the lines of the plan previously submitted (Defendant's Exhibit 1).

The Plaintiffs' complaint also alleges that a second theater complex which the Defendant plans to construct on the west side of El Paso does not comply with the requirements of the American with Disabilities Act. This planned construction was the subject of the Plaintiffs' motion for a preliminary injunction which the court denied without prejudice in June, 1998. At the hearing on the motion for a preliminary injunction, the Defendant's witnesses represented to the Court that construction of the second El Paso complex would begin before the end of the year. However, at the hearing on remedies, counsel for the Defendant revealed a change of plan. The Defendant now has no plans to begin construction of a second El Paso complex within the next two years. Due to the uncertainty as to whether a second El Paso complex will ever be built by the Defendant, no injunctive relief is warranted at this time based on the doctrine of ripeness. *Pacific Gas and Electric Company v. State Energy Resources Conservation and Development Commission*, 461 U.S. 190, 200-201 (1983) ; *Maryland Casualty Company v. Pacific Coal and Oil Company*, 312 U.S. 270, 273 (1941) . The Plaintiffs' motion for injunctive relief with respect to the second theater complex is denied without prejudice.

The Plaintiffs in this action are seven individuals and two

organizations. The individual Plaintiffs are Jose G. Lara, E. J. Lozano, Alfredo Juarez, G. Tim Hervey, Earl L. Harbeck, Luis Enrique Chew, and Myra Murillo. The Plaintiffs' complaint includes a prayer for statutory damages under the Texas Human Resources Code. section 121.003(a) of the Code provides that persons with disabilities have the same rights as able-bodied persons to the full use and enjoyment of any public facility. Any person, corporation, or organization who violates section 121.003(a) commits a misdemeanor offense, and may be punished by a fine of not less than $300 or more than $1000. Texas Human Resources Code, § 121.004(a). Of more relevance to this case, an individual person with a disability who is deprived of his rights is authorized to maintain a cause of action for damages, and there is a conclusive presumption of damages in the amount of at least $100. Texas Human Resources Code, §121.004(b). In the instant case, it is not disputed that each of the individual Plaintiffs attended at least one showing of a motion picture at the Defendant's Tinseltown complex. Five of the individual Plaintiffs (Lara, Juarez, Harbeck, Chew, and Ms. Murillo) are described as wheelchair bound, and the Court finds that each of these Plaintiffs has established his or her right to recover statutory damages of $100 pursuant to Section 121.004(b) of the Texas Human Resource Code. The complaint goes on to allege that Plaintiff Hervey has a physical disability which is not further described, but he is not wheelchair bound. Finally, Plaintiff Lozano is described as blind and needing the services of a guide dog. It is not clear that either of these two Plaintiffs has been directly affected by the Defendant's failure to comply with the Texas Human Resources Code, and damages will not be awarded to these individuals.

The Plaintiffs in this case are found to be prevailing parties,

and are entitled to an award of reasonable attorney's fees. In fact, the Plaintiffs filed a motion for attorney's fees on December 7, 1998, alleging their entitlement to an award of attorney's fees in the amount of $108,324.50, plus reasonable costs in the amount of $22,935.39. Since the Plaintiffs' attorneys continued to provide necessary services after December 7, 1998, however, they may wish at this time to file an amended and updated motion for attorney's fees and costs. Pursuant to Local Rule CV- 7(j) of the Local Court Rules of this Court, the Plaintiffs' motion for an award of attorney's fees must be filed within fourteen days after entry of the judgment in this case.

It is therefore ORDERED, ADJUDGED and DECREED that the Defendant, Cinemark USA, Inc., proceed forthwith to modify the eighteen auditoriums at Tinseltown USA to bring them into compliance with the requirements of the Americans with Disabilities Act.

It is further ORDERED, ADJUDGED and DECREED that the Defendant, Cinemark USA, Inc., pay statutory damages pursuant to Section 121.004{b} of the Texas Human Resources Code to the following Plaintiffs in the following amounts: Jose G. Lara, $100; Alfredo Juarez, $100; Earl L. Harbeck, $100; Luis Enrique Chew, $100; and Myra Murillo, $100.

It is further ORDERED that the Plaintiffs file their motion for attorney's fees, supported by appropriate affidavits, within fourteen days of the date of this judgment.

It is further ORDERED, ADJUDGED and DECREED that all relief prayed for by the Plaintiffs not specifically granted be, and it is hereby, DENIED.

SIGNED AND ENTERED this 4th day of February, 1999.

/s/

HARRY LEE HUDSPETH
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

[Filed April 17, 2000]

JOSE G. LARA, E. J. LOZANO, ALFREDO JUAREZ, G. TIM HERVEY, EARL L. HARBECK, VOLAR CENTER FOR INDEPENDENT LIVING, LUIS ENRIQUE CHEW, DESERT ADAPT, MYRA MURILLO, MARGARITA LIGHTBOURNE-HARBECK, Plaintiffs-Appellants,	)	No. 99-50791
v.	)	
CINEMARK USA, INC., Defendant-Appellee.	)	

Appeal from the United States District Court
For the Western District of Texas

Before DAVIS, EMILIO M. GARZA and DENNIS, Circuit Judges.

PER CURIAM[1]:

Plaintiffs appeal the district court's denial of expert witness fees pursuant to 42 U.S.C. § 12205, which permits district courts to award "a reasonable attorney's fee, including litigation expenses, and costs" to a party prevailing under the ADA. Plaintiffs premise this appeal upon the district court's August 21, 1998 Order granting summary judgment on behalf of Plaintiffs. Recently, this Court reversed that order and rendered judgment for Defendant, Cinemark, Inc. Accordingly, Plaintiffs are not a prevailing party and may not obtain fees and costs under 42 U.S.C. §12205. The judgment of the district court is therefore affirmed.

---

[1] Pursuant to 5th CIR.R.47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5thCIR.R. 47.5.4.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

JOSE G. LARA, et. al.,	)	
Plaintiffs,	)	
	)	NO. EP-97-CA-502-H
v.	)	[Filed July 16, 1999]
CINEMARK USA, INC.,	)	
Defendant.	)	

ORDER REGARDING PLAINTIFFS' REQUEST FOR COSTS AND LITIGATION EXPENSES

This was a civil action for damages and for injunctive and declaratory relief under the Americans with Disabilities Act (the "ADA"), 42 U.S.C. §§12181 et seq. and Chapter 121 of the Texas Human Resources Code. The action was brought by a group of disabled persons who complained that the Defendant's El Paso theater complex, Tinseltown USA, was not in compliance with the requirements of the ADA. On August 21, 1998, the Court entered summary judgment in favor of the Plaintiffs. The Plaintiffs subsequently moved for attorneys' fees, including litigation expenses and costs, pursuant to 42 U.S.C. §12205. On March 22, 1999, the Court entered an order awarding the Plaintiffs $83,527.00 for the services of their attorneys. The Court, however, reserved judgment on the Plaintiffs' request for costs and litigation expenses pending receipt of supplemental information.

Title 28 U.S.C. §12205 provides that a "prevailing party" may be awarded "a reasonable attorney's fee, including litigation expenses, and costs...." The party seeking attorneys' fees has the burden of proving the reasonableness of the request. *See, e.g., Riley v. City of Jackson, Miss.*, 99 F.3d 757, 760 (5th cir. 1996). In the present case, there is no dispute that the Plaintiffs are the prevailing parties, and the Court already has awarded reasonable fees for the Plaintiffs' attorneys. The question here is the amount of litigation expenses and costs the Plaintiffs may recover.

The Plaintiffs seek to be reimbursed in the total amount of $23,366.89 for litigation expenses and costs. In particular, the Plaintiffs seek to be reimbursed in the amount of $13,423.39 for the services of A. Laurence Field, who provided expert testimony regarding wheelchair accessibility in movie theaters. The Plaintiffs also seek to be reimbursed in the amount of $2,545.35 for the services of BPLW Architects & Engineers ("BPLW"), which was hired to develop a retrofitting proposal for the Plaintiffs and to provide expert testimony regarding that proposal. The Defendant objects to Mr. Field's requested hourly rate of $125.00 an hour, arguing that $80.00 an hour is a reasonable rate. However, the Defendant has not made any objection to the time spent by BPLW on this case or to the Plaintiffs' request to be reimbursed for the cost of BPLW's services.

Noncourt appointed expert witness fees in excess of the amounts set forth in 28 U.S.C. §1821 may only be taxed as costs when expressly authorized by Congress or when one of the three exceptions recognized in *Alyeska Pipeline Services Co. v. Wilderness Society*, 95 S.Ct. 1612 (1975), applies. *See International Woodworkers of Am. v. Champion Int'l Corp.*, 790 F.2d 1174 (5th cir. 1986), *aff'd sub nom., City of Houston,*

Texas v. Hill, 107 S.Ct. 2502 (1987) . The ADA, which was enacted on July 26, 1990, statutorily overruled this holding for certain types of cases. For example, the ADA's prohibition of employment discrimination is enforced by the same powers, remedies, and procedures set forth in Title VII, 42 U.S.C. §2000e-5(k) , which provides for the recovery of expert fees. See 42 U.S.C. §12117(a) . In contrast, §12205, which generally provides for the recovery of attorneys' fees in any action or proceeding brought under the ADA, does not explicitly or by incorporation provide for the recovery of expert fees.

The only mention of expert fees in the legislative history of §12205 is an explanatory comment in the House Report, which states that "[l]itigation expenses include the cost of expert witnesses." *See* H.R. Rep. No. 101-485(111), 101st Cong., 2d. Sess. 73 (1990) . There is no indication in the legislative history that this definition of "litigation expenses" was adopted or approved by the Senate. Thus, the legislative history is too sparse and uncertain for the Court to conclude that Congress intended for expert fees to be recoverable under §12205 (especially in light of more explicit provisions elsewhere in the ADA). *See West Virginia Univ. Hosp. V. Casey*, 111 S.Ct. 1138 (1991) (statutorily overruled by the Civil Rights Act of 1991, Pub.L. 102-166, which amended §1988 to provide explicitly for the recovery of expert fees); but see *Robins v. Scholastic Book Fairs*, 928 F.Supp. 1027, 1036 (D.Or. 1996) (citing the House Report as an alternate justification for the award of various costs as litigation expenses); and see *Corbett v. Nat'l Products Co.*, 1995 WL 284248 (E.D. Pa. May 9, 1995) (awarding expert fees and other litigation expenses under §12205). Since §12205 does not expressly authorize expert fees and none of the *Alyeska* exceptions apply, the Court finds that the Plaintiffs' request for costs and litigation expenses

should be denied to the extent that the Plaintiffs are seeking reimbursement for expert fees.[2]

The Defendant objects to the remainder of the Plaintiffs' request for costs -- in the amount of $7,398.13 -- because the Plaintiffs did not submit supporting documentation. This objection is without merit. It was not necessary for the Plaintiffs to support their request with receipts, invoices, and the like. *See Duke v. Uniroyal, Inc.*, 743 F.Supp. 1218, 1227 (E.D. N.C. 1990) ("It is not necessary or desirable for federal courts to review receipts for every five dollar expenditure. Judges, being former practicing attorneys, are quite capable of determining the reasonableness of expenses incurred during litigation."), *aff'd in relevant part*, 928 F.2d 1413 (4th Cir. 1991). The Plaintiffs sufficiently documented their costs by providing an itemized list of their expenses. This list reflects that most of the Plaintiffs' costs can be attributed to attorney travel ($3,081.20) and deposition transcripts ($2,313.65). Moreover, the Plaintiffs' supplemental motion for litigation expenses and costs adequately explains several cryptic entries noted by the Court in its previous order regarding the Plaintiffs' request for attorneys' fees.

Other than its arguments relating to expert fees, the only specific objection made by the Defendant to the Plaintiffs' request for litigation expenses and costs is an objection to the Plaintiffs' request to recover their share of the mediation cost ($250.00). The Defendant does not clearly articulate a legal

---

[2] The Plaintiffs have not addressed what amounts, if any, they may recover for the services of Mr. Field and BPLW under 28 U.S.C. §1821. The Court also notes that the summary manner in which the Plaintiffs have itemized the time spent by Mr. Field and BPLW on this case does not lend itself to an analysis under §1821.

basis for this objection, but states that the parties agreed to share the costs of mediation and cites an unpublished opinion to support its assertion that it should not be responsible for paying the Plaintiffs' share. *See Dibler v. Metwest*, 1997 WL 222910 at *9 (N.D. Tex. April 29, 1997). The opinion cited by the Defendant, however, addressed a request for fees under 28 U.S.C. §1920. Section 12205, which is the relevant provision in this case, provides for a broader recovery than §1920. *See, e.g., Robins v. Scholastic Book Fairs*, 928 F.Supp. 1027, 1036-37 (D. Or. 1996), (interpreting 42 U.S.C. §12205 to allow recovery for "all necessary litigation expenses, so long as they are not overhead expenses absorbed by counsel" and awarding costs for long distance, messenger service, postage, and travel) , *aff'd*, 116 F.3d 485 (9th Cir. 1997). The Court has been unable to find any authority, and the Defendant has cited none, to support the Defendant's assertion that mediation expenses are not recoverable under §12205. For the foregoing reasons, the Court finds that the Plaintiffs' expenses, in the total amount of $7,398.13, were necessary and reasonable and may be recovered.

It is therefore ORDERED that the Plaintiffs do have and recover of and from the Defendant litigation expenses and costs in the amount of Seven thousand three hundred and ninety-eight and 13/100 Dollars ($7,398.13), for all of which let execution issue.

SIGNED AND ENTERED this 16th day of July, 1999.

/s/
HARRY LEE HUDSPETH
UNITED STATES DISTRICT JUDGE